**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 302 | ) | |
| of the Telecommunications Act | ) | CS Docket No. 96-46 |
| Act of 1996 | ) | |
| | ) | |
| Open Video Systems | ) | |

# COMMENTS OF RAINBOW PROGRAMMING HOLDINGS, INC.

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## COMMENTS OF RAINBOW PROGRAMMING HOLDINGS, INC.

Rainbow Programming Holdings, Inc. ("Rainbow"), by its attorneys, hereby submits these Comments in response to the Commission's Notice of Proposed Rulemaking in the above captioned proceeding.[1/]

## INTRODUCTION AND SUMMARY

Rainbow, a wholly-owned subsidiary of Cablevision Systems Corporation ("Cablevision"),[2/] is the managing partner of several partnerships that provide a unique mix of national and regional video programming to millions of subscribers of cable and other multichannel video delivery systems across the country.[3/] Nearly two years ago, with a letter

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[1/] In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, Report and Order and Notice of Proposed Rulemaking, rel. March 11, 1996 ("NPRM").

[2/] Cablevision, a producer and packager of video programming, is in the business of developing and marketing a diverse array of video programming services over various distribution systems.

[3/] Today, these programming services include American Movie Classics, Bravo, News 12 Long Island, News 12 Westchester and News 12 Connecticut (regional news channels),

to Bell Atlantic, Cablevision and Rainbow initiated requests for capacity on numerous video dialtone systems.[4/] They believed then -- as they do now -- that truly "open" video platforms would offer them the rare opportunity for direct access to the consumer unimpeded by an intermediary. They took seriously the Commission's commitment to ensuring nondiscriminatory access to the video platform as the means of achieving "increased competition in the delivery of video services and greater diversity of video programming."[5/] In practice, however, video dialtone proved to be a discriminatory platform that obstructed competition rather than enhancing it.

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MuchMusic, regional SportsChannel Services, NewSport, the national backdrop sports service of Prime SportsChannel Networks, The Independent Film Channel, and PRISM, a premium sports and movie service serving the Philadelphia market. In addition, in the near future, Rainbow expects to launch other new programming services.

[4/] See Letter from Marc Lustgarten, Vice Chairman, Cablevision Systems Corporation, to James G. Cullen, President, Bell Atlantic Corporation (July 29, 1994), attached at Ref. B to Comments of Cablevision Systems Corporation, Application of The Bell Atlantic Telephone Companies, File No. W-P-C 6966 (filed July 29, 1994). See also "Cable Chief Casts His Eye on Competitors' Turf," Wall Street Journal, B1 (June 30, 1994) (describing Cablevision's interest in offering programming to consumers in areas where it does not operate cable systems, using other distribution media).

On January 23, 1995, Rainbow sent inquiries to other video dialtone applicants, including Southern New England Telephone Co. ("SNET") and US West.

[5/] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, 7 FCC Rcd 300, 306 (1991) ("First Report and Order"), recon. 7 FCC Rcd 5069 (1992) ("Memorandum Opinion and Order"), aff'd Nat'l Cable Television Ass'n v. FCC, 33 F.3d 66 (D.C. Cir. 1994) ("NCTA"); Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, 7 FCC Rcd 5781, 5810-11 (1992) ("Second Report and Order"), aff'd in part and modified in part, 10 FCC Rcd 244, 258-59 (1994) ("Video Dialtone Reconsideration Order"), appeal pending sub nom. Mankato Citizens Telephone Company v. FCC, No. 92-1204 (D.C. Cir. Sept. 9, 1992). The Commission defined "video dialtone" as the provision of a basic common carrier platform with sufficient capacity to accommodate multiple video programmers on a non-discriminatory basis.

Rainbow's experiences since 1994 -- with Bell Atlantic, SNET, and US West -- have fallen far short of the video dialtone promise of nondiscriminatory competitive opportunities. In 1995, for instance, Rainbow obtained 192 channels on Bell Atlantic's Dover Township, N.J. video dialtone system, but Rainbow has been unable to put these channels to use because of Bell Atlantic's repeated anticompetitive and discriminatory conduct. Specifically, Bell Atlantic and its favored programmer, FutureVision, have used their unilateral control over essential equipment and software to effectively deny Rainbow access to Bell Atlantic's purported "open system." Even if Rainbow could somehow gain nondiscriminatory access to these essentials, however, it would still need to contend with pricing strategies that have been secured by undisclosed and unfair business affiliations between Bell Atlantic and FutureVision[6/] and overcome unreasonable tariff terms and conditions that have been structured to enable Bell Atlantic to discriminate against Rainbow. Meanwhile, Bell Atlantic's FutureVision has begun commercial service.

Likewise, over Rainbow's repeated objections to the Commission, US WEST and SNET improperly denied Rainbow access to any capacity on their video dialtone systems, while according their favored video programmers the benefits of pre-allocated channels, preferential channel positions, unreasonably excessive channel capacity, and impermissible channel sharing plans.

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[6/] Rainbow has asked the Commission to require Bell Atlantic to fully disclose its relationship with FutureVision. In the Matter of Bell Atlantic Telephone Companies, Transmittal Nos. 741, 786, CC Docket No. 95-145, Rainbow Opposition at 6-26 (filed Nov. 30, 1995).

Not coincidentally, having thwarted Rainbow's efforts to obtain its own capacity on their video platforms, all three telephone companies -- through their proxy video programming providers -- have sought coerced access to Rainbow's programming.

Rainbow stands ready and willing to compete in the video dialtone marketplace and use its resources and expertise to offer consumers high quality video programming, but it has found the rules of engagement to be far different from the video dialtone rules set forth by the Commission. Willful efforts by telephone companies to defeat competition and the Commission's unwillingness to make vigorous enforcement of its own rules a priority have thus far combined to defeat Rainbow's efforts to use video dialtone to increase competition in the video marketplace. At every turn, the telephone companies successfully frustrated Rainbow's considerable efforts to make video dialtone a viable and competitive business.

The lesson here is straightforward: unless the Commission wishes to repeat the mistakes of video dialtone, it must craft rules for open video systems that unambiguously preclude the kind of discrimination and anti-competitive conduct that characterized the telephone companies' dealings with Rainbow. It is not enough to proscribe discrimination with a general directive; the rules must be clear and readily-enforceable.

Rainbow again stands ready to take advantage of the opportunities presented by the availability of open video delivery systems, and to use those opportunities to provide a wide variety of news, sports, and entertainment programming directly to customers. Without clear, well-defined safeguards to ensure the nondiscriminatory treatment of unaffiliated programmers on open video systems, however, local exchange carriers and their proxy

programmers will once again frustrate competition by using open video systems to foreclose entry and establish a marketplace advantage for their own services.

To prevent the recurrence of the serious problems that characterized video dialtone, these rules must ensure that:

- all video programming providers ("VPPs") are treated in a nondiscriminatory fashion with respect to access to the open video system;
- all VPPs have nondiscriminatory access to the information and essential features (such as channel positioning, end-user data, and system hardware and software) necessary to utilize the platform;
- all VPPs have nondiscriminatory access to system rollout plans, activation schedules, billing services, and other information or services to enable all programming providers can market on an equal footing with the programming provider affiliated with the OVS operator;
- there is full public disclosure of all business relationships between OVS operators and video programming providers;
- there is an open, prospective, and verifiable enrollment period of reasonable duration;
- the enrollment process is fair to all interested parties, and the result is demonstrably fair; and
- any channel sharing mechanism has been agreed to by all VPPs that will actually participate on the platform, and that channel sharing will be administered in a manner that can accommodate new VPPs as existing ones drop off or channel capacity expands.[7/]

Adherence to a nondiscriminatory regime also means that a VPP should not be allowed to use the program access rules[8/] to demand programming from a would-be

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[7/] The rules adopted in this proceeding should also be applied to the video dialtone systems grandfathered by the 1996 Act. 1996 Act, § 302(b)(3).

[8/] 47 C.F.R. § 76.1000 et seq.

competitor, as the favored programming providers on video dialtone platforms have done. The OVS framework contemplates that all video programmers will compete on equal terms if they choose to obtain capacity on the platform. If Rainbow is forced to provide programming to one of its potential competitors on an open video system, it will effectively be foreclosed from competing directly for subscribers. Congress specifically limited the applicability of the program access rules to OVS operators; extending it to program providers utilizing the platform would diminish the diversity of voices on open video systems.

Finally, the Commission must develop effective grievance procedures.[9/] Potential programmers should not be forced into "take it or leave it" deals with OVS operators. Congress provided that all disputes under the OVS rules must be resolved within 180 days.[10/] In order to implement this mandate, the Commission must identify specifically the remedies for aggrieved parties, including an immediate right of access to capacity on an expedited basis at rates, terms, and conditions that are not discriminatory in comparison to those imposed on affiliated programmers. An immediate right of access is absolutely necessary to bring some fairness to the relationship between them and the OVS operator. Without such a provision, it will be too easy for OVS operators to evade their responsibilities under the Act.

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[9/] See NPRM at ¶ 72.

[10/] 47 U.S.C. § 573(a)(2).

## I. OPERATORS OF OPEN VIDEO SYSTEMS MUST TREAT VIDEO PROGRAMMING PROVIDERS IN AN EQUITABLE AND NONDISCRIMINATORY MANNER

Congress established open video systems as an alternative to cable, offering OVS operators streamlined regulation in exchange for the nondiscriminatory[11/] provision of channel capacity. OVS is not like traditional cable service because it is based upon a video "platform" that is open to competing programmers -- not just the OVS operator's programming. Specific nondiscrimination rules are absolutely essential if OVS is to provide a real competitive alternative that enhances diversity and consumer choice in the video marketplace.[12/] It is noteworthy that, in the absence of such rules, virtually the only program providers using video dialtone are the telephone companies' proxy programmers.

### A. The Commission should adopt a definition of affiliate that is sufficiently broad to prevent discrimination

As a threshold matter, the test of reasonable non-discrimination rules is the definition of an "affiliate."[13/] Define this term too narrowly, and a local exchange carrier will be able to favor captive or proxy programmers or video programming providers ("VPPs") without violating the statutory proscription on discrimination.

To avoid this result, "affiliation" should be defined to include any financial or business relationships, by contract or otherwise, directly or indirectly, between the OVS

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[11/] 47 U.S.C. § 573.

[12/] Contrary to the Commission's suggestion, NPRM at ¶ 34, adopting merely a general standard of non-discrimination would be inadequate to meet the Act's objectives. Indeed, it would be counterproductive.

[13/] This definition cannot be postponed to a later date. See NPRM at ¶ 9 n.28 (postponing until "Cable Reform" rulemaking the definition of "affiliate" in the Title VI context).

operator and the VPP, except the carrier-user relationship.[14/] This definition would encompass the existence of any ownership or financial interest, affiliation, contingent interest, or other agreement between a OVS operator and a video provider on its platform, including, but not limited to, the right to acquire such video provider or to utilize their capacity, which could give the OVS operator the incentive to favor that video provider over others.[15/] Of course, there must be full public disclosure of all business relationships between OVS operators and video programming providers in order to enforce this rule.

The proposed definition would capture not only formal relationships, such as the existence of a management agreement and equity investments, but also "informal" relationships, such as favored contracts and agreements between the OVS operator and the programmer that were commonplace in video dialtone. As Rainbow has demonstrated, local exchange carriers ("LECs") have repeatedly established relationships with certain video programmers that were the antithesis of the kind of arm's-length transaction between an independent video programmer and a platform provider envisioned under video dialtone.

SNET's carriage agreement with Connecticut Choice Television ("SNET/CCT Agreement") illustrates the lengths to which the LECs will go to use proxies to chill competition on their video dialtone platforms. The SNET/CCT Agreement provided SNET with a direct financial incentive to discriminate in favor of CCT at the expense of Rainbow and other independent programmers that sought capacity on SNET's platform by giving

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[14/] Cf. 47 C.F.R. § 63.08(e).

[15/] Of course, the term should also include situations in which the OVS operators and video operator have a common officer, director, or other employee at the management level.

SNET both a conditional purchase option in the bulk of CCT's capacity and a right to veto any potential third-party purchase of CCT, as well as a right to acquire CCT's business interest.[16/]

In Dover Township, New Jersey, Rainbow discovered evidence of a continuing preferential arrangement between Bell Atlantic and one particular video programming provider -- FutureVision of America Corp. ("FutureVision"). Those arrangements enabled FutureVision to provide service at rates that no other competitor could possibly match,[17/] and gave it first claim to interface software that its competitors would need to provision of video programming on Bell Atlantic's platform.[18/] If OVS operators are permitted to

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[16/] In the Matter of SNET, File Nos. W-P-C 6858, 7074, CCT Agreement at §§ 12.1-12.4 (public version) (filed Nov. 22, 1995).

[17/] For instance, FutureVision offered to sell converters to Rainbow for $1000 per unit -- while it is reportedly offering those converters to subscribers for free. See Rainbow Opposition at 24-25.

[18/] See Rainbow Opposition at 6-26. FutureVision, established in 1992 after the Commission adopted its video dialtone rules and policy, was a small start-up company that was organized for the purpose of marketing, managing and delivering television programming and video services. See "Bell Atlantic and FutureVision Join Forces to Bring the Information Age to New Jersey," PR Newswire (Dec. 15, 1993). Neither deterred by FutureVision's small size nor its potential lack of finances, Bell Atlantic announced that it signed with FutureVision a ten-year, sixty-channel video dialtone agreement on December 15, 1992, the same day Bell Atlantic filed its request for Commission authorization to operate the commercial video dialtone service in Dover Township. Compare In the Matter of the Application of New Jersey Bell Telephone Co., File No. 6840, Application (filed Dec. 15, 1995) with "Bell Atlantic and FutureVision Join Forces to Bring the Information Age to New Jersey," PR Newswire (Dec. 15, 1992).

Even before the platform was opened to enrollment by unaffiliated parties, FutureVision was given advance knowledge of the platform's technical specifications to develop the interface software necessary to provide service to end users. As a result, FutureVision had that software in place long before any potential competitor. See Rainbow Opposition at 15-16.

bestow such advantages on allegedly "unaffiliated" program providers, they will use these tactics to set up proxy programmers to displace true arm's-length competitors and deprive unaffiliated entities of the nondiscriminatory access mandated by the 1996 Act.

### B. Access to the video platform must be open and non-discriminatory

Under the Commission's video dialtone rules, which ostensibly required "access on nondiscriminatory terms to LEC video delivery capabilities,"[19/] Rainbow nonetheless experienced countless problems with providers regarding channel allocation, channel assignment and positioning, pre-subscription and notice provisions, marketing, and access to system hardware and software. There is every reason to believe that these problems will recur unless the Commission adopts clear and readily-enforceable nondiscrimination standards.

#### 1. The enrollment and selection of video programmers must not advantage affiliated or favored programmers

The OVS rules must ensure that operators do not discriminate in favor of affiliated programmers in selecting programmers for carriage. All VPPs must be treated fairly and with equal consideration. Again, Rainbow's experience is instructive. In Connecticut, for example, SNET consistently discriminated against Rainbow in its attempts to secure capacity on SNET's now-defunct video dialtone trial system.[20/]

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[19/] Video Dialtone Reconsideration Order, 10 FCC Rcd at 259.

[20/] Rainbow has previously brought to the Commission's attention the problems it faced in Connecticut. See, e.g., Letter from Donna Lampert to Kathleen M.H. Wallman, Chief, Common Carrier Bureau (July 6, 1995), File No. W-P-C 6858, at 2-5 ("Ex Parte Letter").

From the outset, SNET made every effort to game the allocation process in order to ensure that its captive programmer, Connecticut Choice Television ("CCT") obtained the most favorable channel capacity. First, SNET and CCT initiated discussions that would permit CCT "to offer packaging of cable channels on VDT service if SNET was to offer such a service" almost three weeks before SNET filed its request for Commission authorization to conduct its 1,600-home video dialtone trial in West Hartford, Connecticut.[21/] Within weeks of receiving authority to conduct its West Hartford Trial,[22/] SNET filed for an extension and amendment to conduct a one-year trial of 150,000 additional households in the Hartford and Stamford areas[23/] and almost immediately thereafter awarded CCT 49 of the 53 channels on the extended platform.[24/] In essence, the vast bulk of SNET's broadcast service capacity was assigned to CCT before Rainbow or any other unaffiliated programmer even had notice of this capacity. Rainbow was given no opportunity to seek capacity on the platform comparable to what was given away to CCT.

With respect to the limited amount of capacity remaining, SNET made sure that its affiliated programming entity, SNET Diversified Group ("SNET Diversified"), rather than Rainbow, secured those channels. On January 23, 1995, Rainbow wrote to SNET seeking to

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[21/] Compare SNET First Six-Month Video Dialtone Trial Report, File No. W-P-C 6858, Attachment 2, at 1 with In the Matter of the Application of SNET, SNET Application, File No. W-P-C 6858 (filed April 27, 1993).

[22/] See In the Matter of SNET, 9 FCC Rcd 1019 (1993).

[23/] See In the Matter of SNET, 9 FCC Rcd 7715 (1994).

[24/] See SNET/CCT Agreement at § 5 (public version).

obtain capacity on the basic platform.[25] SNET did not respond until more than three months later.[26] By letter dated April 27, 1995, SNET forwarded to Rainbow some general information and informed Rainbow that a "formal" request was necessary to secure platform capacity, even though no other video programmer had ever before been required to make such a formal request.[27] The very next day -- and prior to the time Rainbow received the informational letter from SNET -- SNET Diversified, an unregulated affiliate of SNET, requested all remaining platform capacity[28] and Rainbow was subsequently told there was no more channels available.[29] Not until nine months after allocating the bulk of its analog broadcast capacity to CCT did SNET purport to propose an "open enrollment" process -- a

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[25] See Ex Parte Letter (Letter from Rainbow to SNET, dated January 23, 1995, attached thereto at Ref. B).

[26] See Ex Parte Letter (Hearing Transcript, Connecticut DPUC Docket No. 95-03-10, at 181-186, 658-665, attached thereto at Ref. C).

[27] Ex Parte Letter (Letter from SNET to Rainbow, dated April 27, 1995, attached thereto at Ref. D).

[28] Ex Parte Letter (Letter from SNET Diversified Group, Inc. to SNET, dated April 28, 1995, attached thereto at Ref. E).

[29] See Ex Parte Letter (Letter from Mr. Michael P. Phelan, SNET Vice President, Network Marketing and Sales, to Ms. Andrea Greenberg, Rainbow Senior Vice President, Business Affairs, dated May 26, 1995, attached thereto at Ref. I). As further proof of SNET's intent to deny Rainbow capacity, SNET Diversified requested "channel capacity of 78 analog channels and 500 digital channels" for SNET's commercial video dialtone service on the very same day SNET filed its Commercial Section 214 Application with the FCC. See Ex Parte Letter (Letter from SNET Diversified to SNET, dated April 28, 1995, attached thereto at Ref. J). Indeed, SNET stated that its request for commercial capacity assumed that the SNET Diversified would be able to displace all of the existing programmers on its video dialtone trial system in West Hartford. Id. (Hearing Transcript, Connecticut DPUC Docket No. 95-03-10, at 729-730, attached thereto at Ref. K).

process that would have provided Rainbow the "opportunity" to request a maximum of two channels of programming of its own choosing on SNET's video dialtone platform.[30/]

To avoid this result under OVS, it is essential that the Commission establish certain core safeguards to govern the programmer enrollment period:

- the enrollment must be held open for a reasonable and publicly documented time period;
- the OVS operator should not require unreasonable deposits from interested programmers; and
- the OVS operator should give all programmers access to information regarding the rates, costs, and nature of additional services available or necessary to provide programming through the OVS offering.

Adoption of these safeguards would ensure adherence to the 1996 Act's fundamental command of nondiscrimination in the enrollment process. As demonstrated by certain aspects of Bell Atlantic's channel reservation process in Dover Township,[31/] such a plan is relatively easy to establish and administer and should provide all interested parties with an adequate framework from which to make informed business decisions regarding the video marketplace.

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[30/] See In the Matter of SNET, File No. W-P-C 6858, Amended Application at 9-10 (filed Sept. 1, 1995).

[31/] While Bell Atlantic's video dialtone tariff in Dover Township, New Jersey proved deficient in many respects, its channel reservation mechanism ultimately provided interested video providers with an open enrollment, channel allocation and channel positioning plan that would promote the non-discriminatory goals of OVS. Here too, however, Bell Atlantic initially attempted to confer special treatment upon its favored video programmer in the form of channel reservation deposit exemptions, pre-allocated channels and preferential channel positioning. See Rainbow Opposition at 8-9. These discriminatory practices were avoided only after the Commission intervened. Id.

### 2. Channel capacity must be allocated in a manner that ensure fair competition

In order to ensure that open video system operators allocate capacity on a non-discriminatory basis,[32/] the Commission must adopt regulations establishing the appropriate means for selecting video programmers and allocating of capacity. These regulations must provide open video system operators and video programming providers with easily understood guidance regarding compliance with the Act. Greater clarity at the outset would also reduce the number of disputes between OVS operators and programmers that will inevitably arise if the Commission adopts only a general prohibition against discrimination.

Ensuring nondiscrimination requires that OVS operators:

- allocate channels to programmers in a fair manner based upon the video programmers' initial requests in the case of requests exceeding available capacity;
- set forth procedures that give programmers a role in deciding how channel positions will be determined;
- allow programmers to determine whether to use analog or digital capacity; and
- give programmers a role in channel positioning decisions.

The Commission's suggestion that it could "adopt a regulation that simply prohibits an open video system operator from discriminating against unaffiliated programs in its allocation of capacity"[33/] should be rejected. Any such regulation would expand OVS operator opportunities to discriminate against unaffiliated video programs and unnecessarily postpones the carriage and allocation considerations which Congress has already determined to be

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[32/] See NPRM at ¶12.

[33/] NPRM at ¶12.

essential to promote fair competition. Indeed, as the Commission learned in the video dialtone context, the allure of promulgating an abbreviated rule now is far outweighed by the costs of adjudicating disputes in an arena of uncertainty down the road.

Experience has shown that in the absence of specific rules, OVS operators will likely deny unaffiliated or non-favored programmers full and fair access to their open video system platforms. Under video dialtone, the LEC simply handpicked a favored video programmer to utilize all, or virtually all,[34/] of the platform's available capacity through individual discussions and closed negotiations.

Rather than establish a formal process to solicit capacity requests from potential video programmers, SNET, US WEST, and, initially, Bell Atlantic,[35/] acted to ensure that their affiliated or favored programming entities, rather than truly independent video programmers, would secure the lion's share of capacity on their video dialtone platforms under preferential terms and conditions that were not available to unaffiliated providers.

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[34/] See e.g., Application of SNET for Approval to Conduct a Dial Tone Transport and Switching Marketing Trial, at 14-15, Connecticut Department of Public Utility Control ("Connecticut DPUC"), June 30, 1995 (finding that SNET's allocation of 49 of the 53 available broadcasting channels to a single video programmer caused capacity problems.

[35/] As originally proposed, the agreement between Bell Atlantic and its favored programmer, FutureVision of America Corp. ("FutureVision") committed 94% (60 of 64 channels) of the capacity on the Dover System to FutureVision. In the Matter of New Jersey Bell Telephone Company, File No. W-P-C 6840, 9 FCC Rcd 3677, 3680, n.44 (1994) ("Dover 214 Order"). After questions were raised regarding whether Future Vision's presence on the Dover Township system and its apparent right to control 60 of the 64 available channels were consistent with the video dialtone nondiscrimination and platform capacity requirements, Bell Atlantic amended its arrangement with FutureVision to restrict the use of any one programmer to 50% of the initial capacity as well as committed to expanding the platform capacity. Id.

While SNET's and Bell Atlantic's attempts to secure capacity for their favored programmers were fairly blunt, Rainbow experienced a more creative, but no less anti-competitive, form of discrimination with regard to its attempt to secure channel capacity on US WEST's video dialtone trial system in Omaha, Nebraska. In Omaha, US WEST notified only selected VPPs about its trial through a "requester/provider letter."[36/] Rainbow was not one of those who received such a notification.[37/] Not only was Rainbow thereby foreclosed from the initial channel allocation,[38/] but even when non-shared channels on the platform became available, Rainbow was informed that it could not have access to that capacity.[39/] Rather than allocating these surrendered channels to new video providers, US West gave most of them to Interface Communications Group, Inc. ("Interface") -- US WEST's favored programmer.[40/] The upshot of this process was to enable Interface, which

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[36/] See US WEST Communications, Inc., 9 FCC Rcd 184 (1993)("Omaha Authorization"); US WEST Communications, Inc., 10 FCC Rcd 4087, 4092 (1995)("Modification Order"). The notification letter apparently described the trial, stated the eligibility requirements, and established the deadlines by when participants must respond.

[37/] See Interface Communications Group, Inc. v. American Movie Classics Company and Rainbow Programming Holdings, Inc., File No. CSR ___, Rainbow Answer, Greenberg Declaration, Ref. No. 1 at ¶ 5 (filed Feb. 15, 1996) ("Rainbow Answer").

[38/] Rainbow sent US WEST a letter inquiring about obtaining capacity on the Omaha video dialtone system over seven months before the trial commenced. Rainbow Answer, Ref. No. 4 (Letter from Andrea Greenberg to A. Gary Ames, dated Jan. 23, 1995).

[39/] Rainbow Answer, Greenberg Declaration at ¶ 5.

[40/] Interface's oral and written representations raise a serious question as to US WEST's relationship with Interface. Mr. Jerry Maglio, who had been hired by Interface to put together its successful bid to assemble programming, pricing, and packaging for the US WEST's video dialtone trial in Omaha, Nebraska, informed Rainbow personnel that Interface was in the preferred position on the US WEST video dialtone platform because only it could market using US WEST's name and use US WEST's billing system. See Rainbow Answer, Dewey Declaration at ¶ 4. Interface also marketed its services using US WEST's name,

initially was to receive only nine channels on the Omaha system, to ultimately control all 77 analog channels -- including the 37 designated for third-party programmers.[41/] Rainbow has been denied any capacity in Omaha.

If it is going to prevent these abuses in the future, the Commission must not only adopt specific rules to govern channel allocation, it must ensure a meaningful opportunity to enforce those rules. In this regard, Rainbow agrees that agreements should between OVS operators and the programmers utilizing OVS should be available for public review.[42/] Full and open disclosure will help to ensure parity between OVS operators and competing MVPDs in accordance with the intent of Congress and the provisions of the Act. The Commission's rules provide adequate protection for proprietary information.[43/]

### 3. Unaffiliated programmers should have nondiscriminatory access to necessary software and equipment

The 1996 Act directs the Commission to adopt regulation to assure the competitive availability of converter boxes, interactive communications devices, and other customer

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claiming it had "an exclusive agreement with US WEST's enhanced services group for the provision of basic and pay programming services. . . . [and that it] will select, price, and package the basic and pay services marketed under the US WEST TeleChoice brand." See Rainbow Answer, Ref. No. 7 (Letter of Julia Melnychuk to Rod Mickler, dated Apr. 14, 1995).

[41/] Alan Breznick, "Movie Madness," Cable World at 16 (Jan. 22, 1996). The article indicates that Interface was marketing a 58-channel basic package as well as 19 channels through TeleChoice.

[42/] NPRM at ¶ 34.

[43/] 47 C.F.R. § 0.457.

premises equipment.[44/] These regulations, and the 1996 Act's requirement to "ensure that the rates, terms, and conditions" for video programming on an OVS platform are "just and reasonable,"[45/] clearly give the Commission the authority to require an OVS operator to make available all equipment necessary to access the OVS platform and provide service to customers on the same rates, terms and conditions provided to its affiliated programmers. Indeed, the prospects for fair competition will never be realized unless the Commission insists upon the core obligations for nondiscriminatory access to all essential equipment required to deliver video programming to subscribers over an OVS platform. Likewise, the Act's nondiscrimination requirement must be read to apply to the availability of the software necessary for unaffiliated VPPs to gain access to the platform to provide service.[46/]

Rainbow's experience with Bell Atlantic's video dialtone system in Dover Township demonstrates that, absent sufficient regulation, a local exchange carrier will use its control over equipment and software to effectively deny unaffiliated video programmers access to an ostensible "open" system. As Rainbow explained in its Opposition to Bell Atlantic's Video Dialtone Service Tariff, despite requesting capacity for 192 channels on the Bell Atlantic platform, Rainbow did not have an equal opportunity to secure access to components critical

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[44/] 47 U.S.C. § 549. See Conference Report at 180. Section 629 does not prohibit telecommunications system operators from also offering navigation devices and other customer premise equipment to customers provided that the system operators' charges for navigation devices and equipment are separately stated, and are not subsidized by the charges for network services. See Conference Report at 180-181.

[45/] 47 U.S.C. § 573(a)(1)(A).

[46/] See Conference Report at 172-173.

to the provision of video dialtone service such as digital set-top boxes. This equipment was not available from other sources at commercially reasonable prices.[47/]

Likewise, Rainbow found that without timely access to interface software, it could not access potential customers over the Dover Township platform. That software is under the control of FutureVision, Bell Atlantic's favored programmer, which threatened to withhold it until Rainbow licensed FutureVision to carry Rainbow's programming. FutureVision's blatant attempt to leverage its control over this essential software underscores the need for Commission regulation to ensure that access to critical OVS equipment and capabilities are provided on the same rates, terms and conditions provided to OVS operators and their affiliates.

Because OVS systems are likely to involve complicated and expensive equipment for which there is no competitive alternative, Commission intervention is overwhelmingly just and necessary. By mandating that essential components be offered on a nondiscriminatory basis until such time as it is competitively available, the Commission will help ensure fair competition under OVS.[48/] OVS operators should not be permitted to discriminate in the provision of essential equipment and functionalities.

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[47/] See In the Matter of Bell Atlantic Telephone Companies, Transmittal Nos. 741, 786, CC Docket No. 95-145, Rainbow Opposition at 14-26.

[48/] See Conference Report at 172-173, 180-181.

### 4. All VPPs must participate in developing channel sharing plans

The Commission must ensure that channel sharing is not used to advantage favored programmers or provide traditional cable service under the guise of OVS.[49] Channel sharing allows the platform provider to require different programmers -- that seek to offer the same video service -- to share the channel on which that service is offered. Proponents of channel sharing believe it provides efficiencies and increases programming diversity.

Contrary to the Commission's tentative conclusion, however, the Act does not permit an OVS operator to choose "how and which programming will be selected for shared channels."[50] Such a conclusion would open up myriad possibilities for an OVS operator to extend its reach over channel capacity beyond the one-third limitation established by the 1996 Act. Rather, the statute merely permits the OVS operator to determine whether to implement a channel sharing arrangement.

Channel sharing remains subject to the general statutory prohibition on discrimination.[51] The Commission itself has recognized that channel-sharing arrangements raise significant legal and policy issues, including the possibility of unreasonable

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[49] The Act permits OVS operators to implement channel sharing. 47 U.S.C. § 573(b)(1)(C). The stated purpose of this provision is "to permit an [OVS] operator to require channel sharing . . . provided that subscribers have ready and immediate access" to any shared channels. Conference Report at 177.

[50] NPRM at ¶ 37. Nor is the Commission correct in tentatively concluding that an OVS operator should be allowed to choose the entity that administers the channel sharing arrangement. Id.

[51] See 47 U.S.C. § 573(b)(1)(A).

discrimination.[52] Any channel sharing mechanism must conform to, and not supplant, the principles of nondiscrimination.[53] To that end, channel sharing arrangements be structured and administered in a nondiscriminatory fashion by an independent third party agreed to by all video programmers on the platform.[54]

For example, under the SNET channel-sharing proposal, only one programmer on the platform, CCT, had an ostensible role in selecting the shared channel programming services.[55] The proposal denied Rainbow and other programmers the opportunity to participate in the selection of shared channel programming services; anointed CCT as the entity designated to administer the programming for the shared channels;[56] excluded programming services that failed to satisfy content criteria established by SNET and

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[52] In the Matter of the Applications of Pacific Bell, FCC 95-302 W-P-C Nos. 6913-6916, at ¶ 32 (rel. August 15, 1995) ("Pacific Bell Order"); see also Video Dialtone Reconsideration Order, 10 FCC Rcd at 371.

[53] See Video Dialtone Reconsideration Order, 10 FCC Rcd at 371.

[54] In this regard, Commission regulation that simply requires OVS operators to appoint an administrator to facilitate the channel sharing process will not be sufficient to minimize the possibility of unreasonable discrimination. US WEST, for example, hired a third-party facilitator to conduct a meeting in Englewood, Colorado among the seven prospective VPPs to its technical and marketing video dialtone trial. Interface, however, clearly dictated the agenda concerning shared and common channels. See In the Matter of US WEST, File No. W-P-C No. 6868, U.S. West Communications, Inc. Analog Channel Programming Facilitation Session, Executive Summary at 5-6 (Jan. 27, 1995). Two VPPs effectively relinquished their decision-making authority to Interface, with one actually giving Interface its vote. Id. at 6. In fact, only Interface and one other VPP participated in the discussion concerning shared channels. Id.

[55] See In the Matter of SNET, File No. W-P-C 6858, Amended Application at 12 (filed Sept. 1, 1995).

[56] Id.

CCT;[57] and contained a cost-sharing formula designed principally to force unaffiliated programmers to bear a wholly disproportionate share of CCT's costs.[58] SNET's channel-sharing plan amounted to nothing more than an effort to preserve and strengthen unlawful discriminatory advantages SNET had secured with its favored programmer, CCT, almost two years earlier.

To prevent these abuses under OVS, channel-sharing must comply with the following principles:

- all video programmers on the platform should be involved in the process of selecting the programming for the shared channels;
- no programming services should be excluded from consideration for the shared channel package on the basis of content;
- unaffiliated programmers should not be required to bear a disproportionate share of the costs of the shared channels;
- programmers must retain the right to decline to participate in channel-sharing;[59] and
- OVS operators cannot be allowed to enter into arrangements that could disproportionately favor the OVS operator or its affiliated programmer with respect to the distribution of advertisement availabilities ("ad avails") and related revenue.[60]

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[57] See SNET/CCT Agreement at ¶ 5.

[58] See In the Matter of SNET, File No. W-P-C 6858, Amended Application at 12-16, Cablevision/NECTA Petition to Deny SNET Amended Application, at 49-52 (filed Sept. 26, 1995).

[59] NPRM at ¶ 41.

[60] Instead, the OVS operator could be required to allocate the revenues from the sale of avails to each of the programmers on the shared channels or, alternatively, to permit each programmer to sell its own avails independently and keep the resulting revenues.

### 5. OVS operators should not be permitted to use their telephone monopolies to gain marketing advantages

Congress directed that OVS operators should be prevented from using their marketing activities to discriminate against competitors.[61] To avoid giving its affiliated programming provider marketing advantages, the OVS operator should be required to provide unaffiliated programming providers with timely access to construction plans and activation schedules. That information is critical to knowing where and when to engage in marketing. Without access to that information, unaffiliated providers will always lag behind the marketing efforts of the OVS operator's affiliate. To counter another possible advantage that an OVS operator could confer on its affiliate, unaffiliated program providers should also be able to utilize the billing services of an OVS operator on the same terms and conditions as those services are provided to the affiliate.

The Commission must also establish clear rules with respect to the joint marketing of OVS and voice telephony services by LECs. Because of the dangers of discrimination inherent in telephone company marketing of regulated and unregulated services together, the Commission should prohibit such activities by an incumbent LEC unless certain safeguards are in place.[62]

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[61] 47 U.S.C. § 573(b)(1)(E) (forbidding discrimination with regard to "material or information (including advertising) provided by the operators to subscribers for the purposes of selecting programming on the open video system, or in the way such material or information is presented to subscribers.").

[62] See In the matter of American Telephone and Telegraph Co., 98 FCC 2d 943 (1984) ("Sales Agency Order").